In the United States Circuit Court of Appeals for the Ninth Circuit

EMIL HOOF,
Plaintiff in Error,
vs.
PACIFIC AMERICAN FISHERIES,
Defendant in Error.

No. 3590

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HON. EDWARD E. CUSHMAN, *Judge*

BRIEF OF PLAINTIFF IN ERROR

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STATEMENT OF CASE

This action was commenced in the Superior Court of the State of Washington, for Whatcom County, and is an action for damages for personal injuries upon a complaint filed in said Court, which complaint, briefly stated, was in substance as follows:

That the plaintiff on the 16th day of April, 1919, and for a long time prior thereto, had been employed by the defendant as a watchman on a certain vessel known and designated as the "Cleo"; that the said vessel was being built by the defendant for the United States Government; that it had been launched in Bellingham Bay, navigable waters of the United States, but not yet put into commission; that on the said 16th day of April, 1919, while in the performance of his duties as watchman, the plaintiff, on account of the negligence of the defendant in failing to guard or secure certain steps, while said steps were resting o nthe recently oiled deck, negligently left by the defendant in a slippery condition, fell from the bridge deck to the main deck of the said vessel and was permanently injured, for which he claimed damages in the sum of $18,000.00. It was also alleged that because the plaintiff was employed on said vessel after it had been launched, the plaintiff could not recover under the Workmen's Compensation Law of the State of Washington, and that he therefore had only the right to bring an action at common law to recover for his injuries. (Tr. 1-5, inc.)

The defendant is not a Washington corporation,

and on account of the diversity of citizenship made application to have the cause transferred to the Federal Court, and the same was transferred to the Federal Court on January 13, 1920, on said application. (Tr. 6.)

On June 21, 1920, a demurrer to said complaint was filed by the defendant in the United States District Court, on the grounds (1) that the Court had no jurisdiction of the subject matter of the causes of action attempted to be pleaded in plaintiff's complaint or the parties thereto; (2) that said complaint did not state facts sufficient to constitute a cause of action and affirmatively showed that the plaintiff had no cause of action or right to recover. Said demurrer came on for hearing on the 7th day of July, 1920, and the Court, after considering the same, made an order sustaining the said demurrer; to which ruling the plaintiff then and there excepted, and his exception was allowed. And thereupon the Court made an order and judgment of dismissal on the ground that the Court had no jurisdiction of the cause of action pleaded in said complaint; to which ruling and judgment of the Court the plaintiff then and there excepted, and his exception was noted and allowed. (Tr. 8.)

This writ of error is sued out for the purpose of having said order sustaining said demurrer, and the said judgment of dismissal, reversed.

ARGUMENT

The learned trial judge erred in holding that the Court did not have jurisdiction of the cause, for the reasons that:

1. Under the holding of the Supreme Court of the State of Washington the Workmen's Compensation Law of the state did not apply and the plaintiff had a right to bring a common law action, and the action was properly brought in the State Courts; that said action, being properly brought, the defendant by transferring the same to the Federal Courts on the ground of diversity of citizenship, could not then proceed and oust that Court out of jurisdiction, whether the action is maritime or non-maritime.

(2) That the action is one for tort, and as it is shown that it occurred on navigable waters of the United States, the action is maritime, because location is the criterion of admiralty jurisdiction in cases of tort.

(3) The injury, occurring on account of the

defective condition of a vessel, comes within the limits of the doctrine of full compensation for laborers on shipboard on account of unseaworthiness of a vessel, which doctrine has been created and is still especially favored by the American Admiralty Courts.

We will discuss these in the order above given.

I.

REGARDLESS OF THE NATURE OF THIS ACTION, THE TRIAL COURT HAD JURISDICTION, BECAUSE THE PLAINTIFF DID NOT HAVE ANY REMEDY UNDER THE WASHINGTON WORKINGMEN'S COMPENSATION ACT.

It seems clear that if the State of Washington did not have a Workmen's Compensation Act, the Federal Court would have jurisdiction even if the plaintiff's complaint did not bring the cause within maritime jurisdiction. Under the decisions of the Supreme Court of Washington, evidently location is the criterion by which the extent of the Workmen's Compensation Act is determined, and workmen on navigable waters do not come within the Act.

Jarvis vs. Gaggett, 87 Wash., 253.

Shaugnessy vs. Northland Steamship Co., 94 Wash., 325.

Puget Sound Bridge & Dredging Co. vs. Industrial Insurance Commission, 105 Wash., 272.

The case of *Puget Sound Bridge & Dredging Company vs. Industrial Insurance Commission*, supra, was an action brought by the dredging company to enjoin the collection of premiums under the Workmen's Compensation Act. The Industrial Insurance Commission contended that all of the plaintiff's employees engaged in dredging in navigable waters within the State of Washington were subject to the Workmen's Compensation Act, and that premiums should be paid on account of the work of all such employees. The dredging company employed three classes of workmen—those who worked only upon the dredge, those who worked wholly upon the land, and those who worked partly upon the dredge and partly upon the land. The Court held that the dredging company should pay premiums on all the employees who worked exclusively on the land; that it should not pay premiums upon employees working upon the dredge exclusively; that

it should pay premiums on the time of employees who worked alternately on the land and on the navigable water, in proportion to the time that such employees were working on the land.

In the case of *Shaugnessy vs. Northland Steamship Co.,* supra, the Court held:

> "Under Rem. Code, Sec. 6604-27 of the workmen's compensation act, providing that, if any employer shall be adjudicated to be outside of the lawful scope of the act, the act shall not apply to his workmen, an employee injured while engaged on a ship in maritime service is not relegated to his remedies in admiralty, by reason of Sec. 6604-1, which abolishes all civil actions for personal injuries in extra hazardous work; since, being outside the lawful scope of the act, all his rights and remedies remain unimpaired as if the act had never become a law of the state."

In the body of the opinion the Court said:

> "We have not overlooked the decision of Judge Cushman of our Federal district court in *Stoll vs. Pacific Coast S. S. Co.,* 205 Fed. 169, wherein it was held that an action upon the law side of the Federal district court, which could have been maintained in admiralty, for injuries received as the result of the steamship company's negligence could not be maintained; the decision being rested upon the language of section 1 of the act (Id., Sec. 6604-1) above quoted,

> and apparently regarded by the court as absolutely abolishing the employee's right to maintain such an action in the courts and subtituting therefor his right to compensation from the accident fund. The fact that the plaintiff had a right to seek his remedy in admiralty seems not have been noticed in the case. We think, therefore, that the decision would not be a controlling authority here even if the question were a Federal one, as it manifestly is not, since it has to do, in its last analysis, only with the right to maintain a common law action in the state courts."

It will be noticed that in the plaintiff's complaint it was alleged that the claim of the plaintiff was first presented to the Industrial Insurance Commission under the Workmen's Compensation Act and that he was refused relief because he was employed upon navigable waters at the time of his injury. The holding of the Commission is in line with the Supreme Court opinions of the State of Washington, and the facts are that after ships were launched the corporations engaged in building ships in the waters of Puget Sound did not pay premiums on workmen employed on such vessels. This being true, the plaintiff did not have any remedy under the Workmen's Compensation Act, and he had the undoubted right to bring a common law action in the

State Courts. If this Court holds that the Federal Court is without jurisdiction because the action is non-maratime in its nature, then the plaintiff is without any remedy whatsoever.

The fact that the Washington Courts have from time to time decided admiralty cases by no means militates against this conclusion, but actually strengthens it. It will be seen that the key to all of the later Washington cases of this character is *Larson vs. Alaska Steamship Co.,* 96 Wash., 665, which will be found to rest upon the doctrine laid down in *The Hamilton*, 207 U. S., 398 (52 L. Ed. 264), which in construing the clause in the judicial code, "of all civil causes in admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common law remedy where the common law is competent to give it," confers upon the State Courts concurrent jurisdiction with the Federal Courts as to torts committed at sea. The State Court, therefore, in entertaining these admiralty cases, claims no more than concurrent jurisdiction and is not administering any specific state-created remedy or code of laws, but is acting rather under Federal and general maritime law than Washington laws, as may be observed by the continual discussion of maritime law and the

citation of Federal cases occurring therein. It will be found that in any of these cases where the question of jurisdiction has been raised or considered the Court bases its right either directly upon *The Hamilton,* supra, or indirectly through it upon *Larson vs. Alaska Steamship Co.*

II.

LOCATION IS THE CRITERION AS TO MARATIME JURISDICTION IN ALL CASES OF TORT.

In the argument before the trial Court two classes of cases were cited in support of the demurrer. One class of cases cited, however, does not appear to have any bearing on the case, the same being *"The American,"* 56 Fed. 1021, *"The Serius,"* 65 Fed. 226, *"The Furber,"* 157 Fed., 124, *"The Fortuna,"* 206 Fed., 573, *"The Sinaola,"* 209 Fed., 287. While each of them deals with a watchman on shipboard, they are in every case lien actions to recover wages, and therefore cases of contract and not of tort. There is no dispute about the doctrine that the nature of the subject matter determines the ex-

istence of admiralty jurisdiction in cases of contract.

The second contention made was that locality is no more the test of jurisdiction in cases of tort than in contract. This contention is contrary to the overwhelming and almost unanimous weight of authority.

Abbott's Federal Practice (second edition), Vol. 1, p. 291.

A. & *E. Enc.*, vol. 1, p. 656.

Kent's Commentaries (13th edition), 426 (Note B), 429, 430 (Note Y).

1 *Cyc.*, 842.

1 *R. C. L.* (Admiralty), paragraphs 13, 14, 19, 22. (Note 16 to paragraph 13 and Note 19 to paragraph 19, resting on 22 U. S. 191 (56 L. Ed. 159), will be found on reading their authority to show only that injury by a boat to a permanent structure on land is not within the definition of a maratime tort, and not as the language indicates, that the subject matter rather than the locality governs.)

Nor is this rule limited in its application to injuries to crew or passengers, but applies to all persons on board the vessel, as appears from the case of *Leather vs. Blessing,* 151 Otto, 626 (26 L. Ed. 1192), where a consignee of a load of cotton, while

on board to learn whether the cotton had arrived on that vessel, was injured by a fall of part of the cargo, and his recovery of damages was allowed based on the ground that he was lawfully on board.

The 66th Fed., 1013, holds that the improper seizure of a ship under state liquor law was a tort cognizable in the admiralty court. The 4th Fed. at 231 holds that admiralty may give damages to parents for the kidnapping of a minor by a shipmaster and compelling him not continue to work on shipboard during the oyster season, because such act was a maritime tort.

There are, in addition, numerous cases of injuries to stevedores and others whose relations to the ship were similar. These cases will not be quoted, inasmuch as the *Jensen* case and the *Peters* case hereafter discussed in full may be considered t have weakened them by indicting that stevedoring is in itself a maritime occupation. However, an early stevedore case (20 Fed., 135) at a time when the doctrine of the maritime nature of stevedoring had not been formulated, applied to all landsmen the rule above mentioned, viz., that any person lawfully on board is entitled to damages in admiralty for injuries there received.

A somewhat different case is that of *Anderson vs "The E. B. Wood,"* 38 Fed., 44, where one ship was occupying the key berth and a second moored alongside. A sailor of the second ship, while intoxicated, was passing over the first ship and fell into an unguarded hatchway. The Court, while holding that the intoxication of the sailor was sufficient contributory negligence to bar recovery, determined that inasmuch as he was lawfully on board the vessel in the key berth, his injury, if culpable, was a maritime tort, and as such his rights were triable in an admiralty court.

A number of other unusual tort cases where admiralty had jurisdiction may be found in *Curtis' Admiralty Digest*, 34 and 35, and a general statement of the rules of admiralty torts on page 495 of the same work.

Somewhat more in point are the two famous "ladder cases," *The H. S. Pickands,* 42 Fed., 239, and *The Strabo*, 90 Fed., 110. In the former the plaintiff was climbing down a ladder connecting the ship with the dock, when the ladder slipped and he was thrown upon the dock and injured. Damages were not allowed in the Admiralty Court, because

it was held that the injury occurred when he struck the dock, and therefore, occurring on land, was not a maritime tort cognizable in that Court; and in passing it may be noted that his occupation, that of repairing a ship which was already in commission, was by all authorities unquestionably maritime.

The second case overrules the former on the ground that the injury occurred not at the time of impact with the dock, but when the ladder slipped, therefore, again holding locality to be the test, and not the nature of the employment engaged in.

In the case at bar the plaintiff was injured on a boat on tide water, so there can be no question as to the maritime locality, since the doctrine denying jurisdiction as to acts occurring within the body of the county has bene obsolete in the United States since 1846, when it was definitely destroyed by the decision of *Warring vs. Clarke,* 5 Howard, 441. It is apparent, therefore, that to uphold the decision below, this Court must necessarily determine that the old and unquestioned rule that locality is the test of admiralty jurisdiction in tort cases, has been overthrown by the cases cited by the defendant in the lower Court, as follows: *Campbell vs. Hackfield,* 125

Fed., 696, *The Atlantic Transport Co. vs. Imbrovek,* 234 U. S., 63 (58 L. Ed. 1208), *Southern Pacific Co. vs. Jensen,* 244 U. S. 205 (61 L. Ed. 1086), *Peters vs. Veasey,* 40 U. S., 65, which cases will now be considered in detail.

The first of these cases, *Campbell vs. Hackfield,* which is a decision from this Court, is squarely in point and the strongest decision on record in favor of the aboltion of locality as a test of jurisdiction in tort cases. That it was contrary to practically all texts an ddecisions at the time it was decided is admitted by the Court in its quotation from 16 Harvard Law Review, p. 210, which was written after this case had been decided in the District Court and before its assignment in this Court, which states that it

> "infringes a rule which originated in the very nature of admiralty jurisdiction and which has been satisfactory in its practical operations. This test has been all but universally regarded as the sole one. * * * Not only would the adoption of its doctrine unsettle a rule which has long assumed to be the law, but it would make the question of jurisdiction over torts subject to the difficulty which has so often perplexed the cases of contract, viz., the necessity of deciding in each case what is a maritime relation. The decision in the principal case seems there-

> fore unfortunate as increasing complication and uncertainty in the law without apparently securing any practical gain to compensate for these advantages."

The use of the authorities on which it is supported, like those cited in the first point of the plaintiff's argument herein, show the Court to have failed to distinguish between the rule in cases of contract and in cases of tort. The first quotation (from Judge Story) says, in so many words, that jurisdiction in tort actions is always bounded by locality. The quotation from 11 Wallace 1 applies only to contracts, and the first part of that quotation itself automatically rules out any support by the case of *The Queen vs. the Judge of the City of London Court*, since it determines that English restrictions do not apply in American admiralty jurisdiction. This leaves the case to rest exclusively upon the quotation from Benedict's Admiralty, where he states:

> "Cases of torts on the high seas *superaltum mare* have always been held, even in England, to be within the jurisdiction of admiralty, and the jurisdiction in such cases has usually been held to depend upon locality, embracing only civil torts and injuries done on the sea or on waters of the sea where the tide ebbs and flows. It depends upon thep lace where the cause of action

> arises, and the place must be waters which are subject to admiralty jurisdiction,"

and merely adds as *dicta* the sentence:

> "It may, however, be doubted whether the civil jurisdiction in such cases of torts does not depend upon the relation of parties to a ship or vessel, embracing only those tortuous violations of maritime rights and duties which occur in vessels to which admiralty jurisdiction in cases of contract applies * * *."

In the second case, *The Atlantic Transport Co. vs. Imbrovek,* the Court, after summarizing a large number of cases, quoted with aproval from A Wallace 20 (18 L. Ed. 125):

> "Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance,"

supporting the same by some twenty citations; and continues:

> "It is also apparent that Congress in providing for the punishment of crimes committed upon navigable waters has regarded the locality of the offense as a basis for the exercise of its authority,"

followed again by numerous citations; and again continues:

"But the petitioners urge that the general statements which we have cited with respect to the exclusiveness of the test of locality in cases of tort are not controlling, and that in every adjudicated case in this country in which the jurisdiction of admiralty in respect to torts has been sustained, the tort, apart from the mere place of its occurrence, has been of a maritime character. It is asked whether admiralty would entertain a suit for libel or slander circulated on shipboard by one passenger against another. (See Benedict's Admiralty, 4th ed., Art. 231.) The appropriate basis, it is said, of all admiralty jurisdiction, whether in contract or in tort, is the maritime nature of the transaction or event. It is suggested that the wider authority exercised in very early times in England may be due to its antedating the recognition by the common law courts of transitory causes of action, and thus arose by virtue of necessity.

"We do not find it necessary to enter upon this broad inquiry. As this Court has observed, the precise scope of admiralty jurisdiction is not a matter of obvious principle of very accurate history. The Blackheath *U. S. vs. Evans,* 195 U. S. 361-5-7 (49 L. Ed. 236-8), 25 Supm. Ct. Rep., 46. We are not now concerned with the extreme cases which are hypothetically presented. Even if it be assumed that the requirement as to locality in tort cases, while indispensable, is not necessarily exclusive, still in the present case the wrong which was the subject of the suit was, we think, of a maritime nature; hence the District Court, from any point of view, had jurisdiction."

It is evident, from the similarity of the language used, that the Court in stating the contentions of the petitioners, in next to the last paragraph quoted, had in mind the ragument of this Court in the *Hackfield* decision, which had been cited by the defendant's counsel in his brief therein, and it is also evident from expressions of the Court, and citations given in the first part of the quotation also show, that the Court unquestionably disapproved of the doctrine laid down in that decision, and insofar as it was able to do so without making decision upon points not required in the case, overruled it.

The remaining two cases are scarcely in point. *The Southern Pacific Co. vs. Jensen* deals with the extent to which the New York Workmen's Compensation Act may govern injuries aboard ship, the particular instance being the death of a stevedore while engaged in unloading cargo. It is true that the Court there stated, "The work of a stevedore is maritime in its nature and his injuries maritime," citing the *Imbrovek* case, supra, but it does not even mention *Campbell vs. Hackfield* or the question of locality in cases of tort, apparently holding, as in the *Imbrovek* case, that both locality and subject matter are favorable for jurisdiction.

The first dissenting opinion deals with the extentto which admiralty is subject to change by concurrent jurisdiction of common and statutory law, and assumes the maritime nature of deceased's employment, or, rather, minimizes the distinction between maritime and non-maritime torts, without stating whether the assumption is based upon the locality of the injury or the nature of the services. The second dissenting opinion deals principally with the difficult question of the extent to which Federal and State Courts have concurrent jurisdiction in admiralty cases under the clause, "saving to suitors the common law rights where the common law is competent to give them"; and while apparently assuming the maritime nature of the employment, the statement appearing on p. 252 of 244 U. S. (61 L. Ed. 1114), "The civil jurisdiction in admiralty cases *ex contractu* is dependent upon the subject matter. In cases *ex delicto* it is dependent upon locality," which sentiment is elsewhere repeated in different words, would make it appear that these judges must have based their belief as to the maritime nature of the injury upon the fact that Jensen was working upon the ship, rather than his employment there as a stevedore.

The case of *Peters vs. Veasey* is practically parallel with the last case and arises under the Workmen's Compensation Law of Louisiana, and the only statement which can by any stretch of imagination be considered as bearing upon this question is as follows:

> "The work in which the defendant in error was engaged is maritime in its nature, his employment was a maritime contract, and the injuries he received were likewise maritime; and the rights and liabilities of the parties in connection therewith were clearly in maritime jurisdiction,"

which is used in denying the application of the State Workmen's Compensation Law to the case.

The Supreme Court has, therefore, practically overruled the case of *Campbell vs. Hackfield,* and the most favorable view for the defendant that can be taken of its opinions merely states that a stevedore is engaged in a maritime occupation, and there is nothing directly or indirectly to show that an injury to one engaged in a non-maritime occupation occurring within the locality under admiralty jurisdiction will not be considered as a maritime tort in accordance with the long established and almost uanimously approved rule of both the English and American Courts.

A recent re-affirmance of the rule that locality governs may be found on p. 125 of 249 U. S., being 512 of 63 L. Ed. That the above interpretation of the Supreme Court's attitude is recognized as correct by this Court is evidenced by its affirmance of the decision of Judge Neterer in the *Steamship Hokkai Maru and Mitsui & Company, Ltd., a corporation, vs. W. C. Hubbard,* No. 3244. In that case a watchman recovered damages for injury resulting from being thrown off a ladder while boarding a steamer. The Court affirmed the decision and upheld the admiralty jurisdiction on the analogy between this case and that of *The Strabo,* supra, and *The Plymouth,* 3 Wallace 20, apparently conceding the point as too well settled for dispute, and confining the most of its discussion to the questions of negligence and the fellow servant rule.

III.

THE PLAINTIFF SHOULD RECOVER FULL COMPENSATION UNDER ADMIRALTY LAW.

This injury, according to the facts admitted for the purpose of the demurrer, was due to the im-

proper fastening and guarding of a stairway on the ship and to the fact that the stairway, when not properly fastened, was allowed to rest upon a recently oiled and slippedy deck. It therefore comes within the rule first distinctly stated in *The Osceola,* 198 U. S., 599 (47 L. Ed., 760), where the Court, after an exhaustive review of a large number of earlier cases, lays down a series of principles governing damages in American admiralty law, of which the second is as follows:

> "That the vessel and her owner are both by English and Americal law liable to indemnity for injuries received by seamen in consequence of the unseaworthiness of a ship or the failure to supply and keep in order the proper appliances appertinent to such ship."

This principle was acted on in numerous decisions in lower Courts, particularly *The Argo,* 210 Fed., 578, which is an almost parallel case with the one at issue, being for the injury of a seaman due to the improper fastening of an iron guard in the engine room. See also 218 Fed., 81, and 179 Fed., 293, where the Court says:

> "A seaman injured in the service of a vessel has a right to recover against the vessel and her owners for his wages and the expense of his

> maintenance and cure to the end of the voyage, or as long as he has a right to wages, whether he is or they are guilty of negligence, or not, and this is the extent of his right to recover. There is an exception, apparently a departure from American law, but established by so many decisions that the Supreme Court has declined to disturb it, viz., that if the seaman's injury is due to the personal negligence or default of the ship's owners, as, for instance, to the unseaworthiness of the vessel or her tackle, or failure to supply proper medical treatment and attendance, he may recover full indemnity,"

citing *The Iroquois*, 194 U. S., 240 (48 L. Ed., 555), *The Osceola*, supra, and *The Troop*, 128 Fed., 856.

The *Osceola* doctrine has been re-affirmed, word for ford, by the Supreme Court in the case of *Chaelentis vs. Luckenbach Steamship Co.*, 247 U. S., 372 (62 L. Ed. 171).

In a recent case from the State of Washington, Wash. Dec. vol. 12, p. 382, at p. 390, the Court, after referring to Carver on Carriage of Goods by Sea, Sec. 18, said:

> "This was said having in view the general question of liability of carriers to the shippers; but we apprehend that the law calls for an equal degree of safety as to 'design, structure, condition and equipment,' looking to the safety of seamen. It seems to us that the negligent furnish-

> ing of the gasoline in the place of kerosene, under such circumstances as was done in this case, was fraught with even greater perils than the furnishing of the insecure chair pedestal, as was done in the *Larson* case. The former menaced the safety and even the lives of the entire crew, and the existence of the boat itself; while the latter was a menace only to the individual that might seek to use it in some such manner as Larson did. The following authorities, we think, lend support to our conclusion that the maritime law does not stand in the way of respondent's recovery in this case. *The Titana,* 19 Fed. 101; *The Noddleburn,* 28 Fed. 855; *The Troop,* 128 Fed. 856; *The M. E. Luckenbach,* 174 Fed. 265; *The Argo,* 210 Fed. 872; *The Badger,* 218 Fed. 81."

From a reading of the various cases above cited, it will be observed that a seaworthy ship has come to mean in maritime law practically the equivalent of a "safe place to work" in common law, as it has been happily expressed by the petitioner's brief on p. 1173 of the 62nd L. Ed., in *The Clementis vs. Luckenbach Steamship Co.*, supra. The case at bar falls easily within the limits thus set, and the trial court was therefore bound tog rant relief not only to the extent of medical attention required and loss of wages, but also tog rant full and complete indemnity for subsequent loss of earning ability as well.

IV.

UNDER ANY ONE OF THE THREE POSSIBLE VIEWS THAT THE COURT MAY TAKE OF THIS CASE, THE COURT BELOW HAD JURISDICTION.

In a final analysis this case resolves itself into three alternative propositions:

(1) The Court may, following our second contention, conclude that, locality being the test in tort, this is an admiralty case and as such as governed solely by Federal law and triable only in the Federal Courts, and it needs no citation, although this proposition has really been decided in the *Jensen* case and the case of *Peters vs. Veasey*, supra, to show that if this is the case the State Legislature and the State Courts, even if they so desired, had no power to interfere or to oust the Federal Courts from jurisdiction of the matter. Such being the case, there could be no possible alternative to the bringing and determination of this action in the Federal Courts.

(2) The Court may agree that *The Hamilton* and the Washington cases founded thereon state the law, and that in tort cases the State Courts have con-

current jurisdiction with the Federal Courts. If this is the case, there woulud be no particular objection to the determination of this in the Federal Court rather than in the State Court, in any event; and it certainly does not lie within the mouth of the defendant, after having chosen his forum over the protest of the plaintiff, to now object to it and have this case dismissed from Court, leaving the plaintiff remediless, and for no fault of his own.

(3) If, however, this Court should take the view that this is a strictly State matter, and not governed or controlled in any way by the Federal laws or the Federal Courts, it is particularly boun dto regard the decisions of our own State Courts as to the rights of the parties and the effect of the Workmen's Compensation Law, and therefore must decide that the Workmen's Compensation Law has no bearing on the matter and that the proper and only action for the plaintiff is a common law action for damages; and arriving at this conclusion, it must, under the paramount Federal laws and decisions, agree that any common law action in the State Court may properly be transferred on the theory that this one was, into the Federal Courts on the grounds of diversity of citizenship.

The order sustaining the demurrer and dismissing the action should be reversed.

Respectfully submitted,

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